No. 83-947

In the Supreme Court of the United States

October Term, 1983

ROBERT VANCE, D.O.
Petitioner,

vs.

STATE OF UTAH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE STATE OF UTAH

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RESPONSE POSITIONS

I.

The Utah Supreme Court's interpretation of State procedures regarding the revocation of a professional license does not raise substantial Federal questions sufficient for this Court to review.

II.

The petitioner was not denied due process in this matter and the Supreme Court of Utah was correct in its decision.

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Respondent, State of Utah, does respectfully request this Court to deny the petition for Writ of Certiorari, allowing to stand the decision of the Utah Supreme Court revoking petitioner's license to practice Osteopathy in the State of Utah. Petitioner was afforded due process in all respects and his arguments before this Court do not raise substantial Federal questions that should be entertained by this Court.

LATENESS IN FILING RESPONSE

Respondent first received notice on January 6, 1984, that a Petition for Writ of Certiorari had been filed on November 23, 1983 with this Court. Notice of Docketing

was received from John A. Burgess, counsel for Petitioner, that same day which included a blank entry of appearance form. These items were mailed January 4, 1984, by R. Hayes, secretary to Mr. Burgess. On January 9, 1984, Respondent received Mr. Burgess's Appearance Form, also mailed by R. Hayes on January 4, 1984.

On January 13, 1984, Counsel for Petitioner handed Stephen G. Schwendiman, Assistant Utah Attorney General, one copy of the Petition and Appendix, which was the first time any representative from the State of Utah had seen said documents. Thereafter, counsel for Respondent called the United States Supreme Court Clerk's office and was informed that the petition had already been circulated to the Justices. Counsel was informed that in this response, the Court should be informed of the circumstances under which the delay in filing the response was brought.

STATEMENT OF FACTS

Petitioner was charged with numerous acts of unprofessional conduct in the handling of patients, the use of unapproved techniques and the use of unauthorized drugs.

The State of Utah Osteopathic Physicians and Surgeons Licensing Committee found that under its law, the Petitioner had acted in an unprofessional manner on numerous occasions and that his license to practice should be revoked.

Both the Utah State District Court and the Su-

preme Court of Utah sustained the decision of the Committee and denied rehearing from which this Petition for Certiorari is made.

RESPONSE POSITIONS

I.

THE UTAH SUPREME COURT'S INTERPRETATION OF STATE PROCEDURES REGARDING THE REVOCATION OF A PROFESSIONAL LICENSE DOES NOT RAISE SUBSTANTIAL FEDERAL QUESTIONS SUFFICIENT FOR THIS COURT TO REVIEW

Petitioner hopes that the mere use of the phrase "Denial of Due Process" raises substantial Federal questions. Such is not the case. The Utah Supreme Court determined that under Utah law the term "unprofessional conduct" before professional licensing committees was sufficient, that a member of the Committee could sit de facto, and that parties could agree that standards of conduct for a similar profession could be used to be the basis for defining the standards of professional conduct in one's own profession.

This court, in *Zucht v. King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194 (1922), held it to be the duty of the Court to decline jurisdiction in matters not involving substantial and significant issues of Federal import.

French v. Taylor, 199 U.S. 274, 26 S.Ct. 76, 50 L.Ed 189 (1905) holds that when State Courts are deciding what procedures apply under State law to meet the requirements of State law, no Federal questions are

raised to be reviewed by this Court, especially when the contention is only that the observance and not the statutes were unconstitutional. (Quoting also *Castillo v. McConnico*, 168 U.S. 674, 18 S.Ct. 229, 42 L.Ed 622 (1898).

No "substantial" Federal question is here raised. The Utah Supreme Court and inferior courts reviewed and decided State issues — what is acceptable under State law.

Each issue raised was known to Petitioner at the time of hearing, and his agreement to proceed or failure to object precludes any claim of denial of due process. The Utah Courts determined the effect on State law of Petitioner's own action or inaction.

II.

THE PETITIONER WAS NOT DENIED DUE PROCESS IN THIS MATTER AND THE SUPREME COURT OF UTAH WAS CORRECT IN ITS DECISION

a.

UNPROFESSIONAL CONDUCT

Petitioner claims that failure of the reviewing Osteopathic Committee to promulgate rules and regulations defining "unprofessional conduct" infringes upon his constitutionally protected due process right of notice. Petitioner cites as support, *Popachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839 (1972), holding that criminal statutes must provide adequate notice, *Barsky v. Board of Regents of University of New York*, 347 U.S.

442, 74 S.Ct. 650 (1954), holding states have important interests to protect in regulating medicine, *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202 (1981), dealing, not with statutory vagueness, but with indigent paternity evidence costs, *Czarra v. Board of Medical Supervisors*, 25 App. D.C. 443 (1905), holding that no amount of specification can save a constitutionally repugnant provision, and *Yoshizawa v. Hewitt*, 52 F. 2d 411 (9th Cir. 1931), holding a general, undefined provision susceptible to interpretation due to valid delegation of regulatory authority upon licensure. Petitioner's citation of these cases does not support his conclusion.

Both Federal and State law support the application of general provisions defining professional conduct in the regulation of medicine. The Utah Supreme Court's decision regarding the use of the term does not raise a substantial Federal question. Utah law does not require advance publication of standards defining "unprofessional conduct." Section 58-1-13(6), Utah Code Ann. (1953, as amended), allows "unprofessional conduct," to be determined on a case by case basis by the Licensing Committee. Case by case definition/determination is accepted in many jurisdictions, including Utah. *Vance v. Fordham*, 671 P. 2d 124 (Utah 1983); *Buhr v. Arkansas State Board of Chiropractic Examiners*, 547 S.W. 2d 762 (Ark. 1977); *Shea v. Board of Medical Examiners*, 146 Cal. Rptr. 653 (Cal. App. 1978); *Reyburn v. Minnesota State Board of Optometry*, 78 N.W. 2d 355 (Minn. 1956); *In re Mintz*, 378 P.2d 945 (Or. 1963).

Federal courts have, likewise, recognized the importance that ". . . the license of a physician, surgeon, or

dentist may be revoked by the officers or board by which such licenses are granted, is not rendered uncertain or otherwise invalid because the grounds for revocation are therein stated in general terms." *Yoshizawa*, at 414, citing 5. A.L.R. 94; *United States v. Collier*, 478 F.2d 268 (5th Cir. 1973); *Bolton v. Kansas State Board of Healing Arts*, 473 F. Supp. 728 (D.C. Kan. 1979).

Sensitivity to public health, safety and welfare demands that sufficient weight be given to allow Licensing Boards to review individual fact situations to determine whether actions are "unprofessional".

b.

COMMITTEE MAKEUP

Petitioner contends that the presence of a Dr. Greenwood, a graduate of an accredited school of osteopathy, and a practicing Osteopath licensed in four states continuously since 1969, was a denial of due process. Never has petitioner challenged Dr. Greenwood's credentials or professional competence to render a fair decision. Petitioner cites *Brinkley v. Hassig*, 83 F.2d 351 (10th Cir. 1936), and *Gibson v. Berryville*, 411 U.S. 564 (1972) as holding that the presence of a de facto member on a board violates due process.

Petitioner, however, confuses disqualification by reason of prejudgment, pecuniary bias or interest, and personal animosity toward a party, with the presence of a competent, though de facto, member. See *Securities & Exchange Comm. v. R. A. Holman & Co.*, 116 App. D.C. 279, 323 F.2d 284, cert. denied 375 U.S. 943, 84 S.Ct.

350 (1963); *Pillsbury Co. v. Federal Trade Comm.*, 354 F.2d 952 (5th Cir. 1966).

Disqualification of a tribunal member is mandated only when prejudice or bias is direct, definite, and demonstrable. E.g., *State ex rel. Sannon v. Churchwell*, 195 So.2d 599 (Fla. App. 1967). Indeed, the controlling rule of review is that such bias must render the tribunal incapable of fair and impartial judgment. E.g., *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 67 S.Ct. 756 (1947).

"An officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised." *State v. Carrol*, 38 Conn. 449 (1871). Acts of de facto officers, not involving the prejudices mentioned, supra, are given effect in Utah as well. *In re Bunker Hill Urban Renewal Project 1B*, 61 Cal. 2d 21, 389 P.2d 538, 37 Cal. Rptr. 74, cert. denied, 379 U.S. 899 (1964); *People ex rel. Chillicothes Township v. Board of Review*, 19 Ill. 2d 424, 167 N.E. 2d 553 (1960); *Olathe Hospital Foundation, Inc. v. Extendicare, Inc.*, 217 Kan. 546, 539 P.2d 1 (1975); *Mitchell v. Louisiana State Board of Optometry Examiners*, 146 So. 2d 863, (La. Ct. App. 1962), aff'd, 245 La. 1, 156 So. 2d 457 (1963), appeal dismissed, 377 U.S. 128 (1964); *State ex. rel. Marshall v. Keller*, 10 Ohio St. 2d 85, 266 N.E. 2d 743 (1967); *United States v. Groupp*, 333 F. Supp. 242 (D. Me. 1971); aff'd, 459 F.

2d 178 (1st Cir. 1972); *Hussey v. Smith*, 99 U.S. 20 (1878).

Even assuming arguendo that Dr. Greenwood's presence on the Committee was sufficient to make the license revocation voidable, Petitioner failed to object to the Committee as constituted until six months after the rendering of the decision, and therefore, waived his right to contest the irregularity. *Union Drainage Dist. v. Smith*, 233 Ill. 417, 84 N.E. 376 (1908); *Carr v. Duhme*, 167 Ind. 76, 78 N.E. 322 (1906). Both Federal and state jurisdictions sustain decisions of competent, qualified, unbiased de facto members of Boards. No substantial Federal question is here raised.

c.

STANDARD OF CONDUCT

Petitioner was not charged under §58-12-36, Utah Code Ann. (1953) as alleged. Instead, Petitioner's license to practice medicine was revoked pursuant to §58-1-25, Utah Code Ann. (1953), a general provision which provides:

> The department of registration may revoke any license . . . in the following cases:
>
> (1) If the applicant or holder . . . has been guilty of unprofessional conduct."

The petition charging Petitioner with improper conduct cited a definition under the Physicians and Surgeons Medical Practices Act and incorporated that standard to Osteopaths under U.C.A. §58-12-18 and §58-1-25. No

objection was ever raised to such inclusion and that standard was accepted by all parties against which Petitioner's actions would be judged. The Utah Supreme Court construed Utah law to allow the Osteopathic Committee to determine the standard of conduct. The standard of professional conduct defined by the Utah Medical Practices Act, §58-12-36, was mutually adopted by both parties at the hearing "as a suitable expression of the patient-care standard of the osteopathic profession." *Vance v. Fordham*, at p. 45 of Appendix, footnote 3. See also Petition p. 3. paragraph 6 of Appendix.

Respondent feels it impoprtant to point out that through the entire appeals process, Petitioner did not raise this issue, except on petition for rehearing to the Utah Supreme Court. Then, it was only after one of the judges of the Court discussed it in his dissent. The facts establish that it is not a significant issue for this Court to review.

The original petition filed against the present Petitioner and Respondent's view is consistent with the evolution of current medical practices. Physicians, veterinarians, surgeons, dentists and other highly specialized, educated practitioners practice "healing arts." Likewise, practitioners, originally thought to be solely of the "healing arts," now are considered to practice medicine. E.g., *Smith v. Keator*, 203 S.E.2d 411, 21 N.C. App. 102 (1974). See also, Cal. Ann. Bus & P. 2450 et. seq. Like "medical" professions certainly have similar, if not the same, standards of conduct. Osteopathic Physicians and Surgeons have the same privileges, the same rights, and the same standards as medical doctors.

CONCLUSION

Petitioner either agreed to or knowingly kept silent on issues he now claims harmed him. This is not a denial of due process, and does not constitute questions of substantial Federal import which this Court should hear. Respondent requests the Petition for Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED this 10th day of February, 1984.

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PAUL M. TINKER
Deputy Utah Attorney General

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Assistant Utah Attorney General
Chief, Tax & Business Regulation Division

Attorneys for Respondent

CERTIFICATE OF SERVICE

This is to certify that three (3) copies of the foregoing Brief in opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to John A. Burgess, 58 Hillcrest Road, Berkeley, California 94705 and M. Richard Walker, 4685 Highland Drive, Suite 202, Salt Lake City, Utah 84117, this 10th day of February, 1984.

PAUL M. TINKER
Deputy Utah Attorney General
Attorney for Respondent